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In the

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 1013

LOUIS J. SCHWARTZ,
Petitioner,

vs.

RUBENIA TANNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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TO the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Respondent, Rubenia Tanner, prays that the petition for a Writ of Certiorari, filed in the within cause, be denied.

INTRODUCTION

This bastardy case was tried before a jury of the Common Pleas Court of Hamilton County, Ohio in May of 1963.

Respondent testified she and petitioner went on dates in the late summer and early fall of 1960. (R 6-8, 101). She testified they had sexual intercourse in late August 1960, on September 5, 1960, September 10, 1960 and September 11, 1960 (R. 12). Petitioner admitted having sexual intercourse with Respondent on three separate occasions in September of 1960 (R 101). He did not deny having intercourse with her on September 5. He admitted spending the night of September 10 with Respondent in a room at the Hotel Sinton in Cincinnati and did not deny sharing a double bed with her that night. (R 150-151).

The Tanner baby was born May 20, 1961 approximately 258 days after September 5 and 253 days after September 10, 1960. The expert medical witnesses agreed that a pregnancy of between 253-258 days is normal. (R 186, 42, 55). Medical testimony based on external examination during pregnancy confirmed that the baby was conceived sometime in early September 1960 (R 32, 42, 49, 121-122).

Petitioner admitted making payments of approximately $1,000 to Respondent, her physician and the hospital with respect to the pregnancy and her support. (R 24, 26, 26, 27, 28, 37). Respondent and her sister testified she had no dates with other men during the period of possible conception (R 16, 105). Petitioner offered no evidence of any involvement of Respondent with any other man during this period.

At trial Respondent's counsel called Petitioner as a witness. Petitioner did object to his being called as a witness. The Court overruled his objection. Petitioner proceeded to answer the questions posed by Respondent's counsel without any further invocation of the privilege against self-incrimination with respect to some other proceeding. Petitioner voluntarily testified in his own defense covering the same ground that had been covered in his examination by Respondent's counsel. The idea that answering the

question "Were you intimate with the Complainant?" might incriminate Petitioner with respect to a charge of fornication was not raised until two years after the trial. In his motion for new trial, assignments of error, brief before the Court of Appeals, brief before the Supreme Court of Ohio, and oral arguments, there was no mention of any such claim. (See for example, Appendix G and Appendix J of Petitioner's brief before this Court which only protest his being forced "to testify as on cross-examination").

After the trial Petitioner introduced Affidavits (Petitioner's Appendix H and Appendix I) which alleged that one of the jurors made statements in a cafe to the effect that she believed that Petitioner was the father of the child. At the hearing on Petitioner's motion for a new trial, Respondent presented two affidavits which flatly denied the charges and refuted the allegations of bias. These affidavits are also part of the record submitted to this Court.

The trial court as well as the Court of Appeals and Supreme Court of Ohio reviewed *both* sets of affidavits and determined there was no error in the proceedings.

PETITIONER'S CONTENTIONS

I. Petitioner's contention that a bastardy proceeding is a criminal case, and that Respondent's counsel had no right to compel petitioner to testify as a witness, has no merit.

The Supreme Court of Ohio has held that purpose of a bastardy proceeding is to enforce the duty of making provision for the maintenance of illegitimate offspring rather than to punish for misconduct and that a bastardy proceeding, under the Ohio statute, "in purpose and effect is essentially civil" and is "essentially a civil action" rather

than a criminal proceeding. *State ex rel Gill* v. *Volz*, 156 OS 60.

This classification by the Ohio Courts is in accord with the general rule throughout the nation. See 10 *CJS* Section 32, p.143: "Bastardy proceedings are generally considered under the various statutes to be civil in nature" and 10 *Am. Jur. 2*, Section 75, p.90 where it is stated that bastardy proceedings are "uniformly held to be civil proceeding." The footnotes at 10 *CJS* 143 and 10 *Am. Jur. 2*, 90, list cases in 23 jurisdictions and 18 jurisdictions respectively in support of the rule. For recent examples see *State* v. *Lender*, 124 NW 2d 355 (Minn.); *Dunn* v. *Grisham*, 157 SO 2d 766 (Miss..); *People* v. *O'Malley*, 192 NE 2d 589 (Ill.); *Stroman* v. *Gilbert*, 197 A 2d 99 (Conn.); *Commonwealth* v. *Dunnick*, 202 A 2d 542 (Pa.).

As a result the Courts have uniformly held that the Defendant may be called as an adverse witness and compelled to testify in a bastardy proceeding. For examples, see *Burt* v. *State*, 79 Ind. 359; *Territory* v. *Lanier*, 40 Hawaii 65; *State* v. *Jeffrey*, 188 Minn. 476; *State* v. *McKay*, 54 ND 801.

The most recent Ohio cases, *Taylor* v. *Mosley*, 87 OLA 335 (1961) and *State ex rel Johnson* v. *Mooney*, 87 OLA 105 (1961) follow the rule. In the *Taylor* case the Court held:

> ". . . an accused in a bastardy case may be called by counsel for complainant and over defendant's objection be compelled to testify under cross-examination."

In the *Johnson* case the Court held:

> "A bastardy proceeding is a civil action . . . it is thus governed by the rules of civil procedure and the right to call the putative father for cross examination is under favor."

The Supreme Court of the United States established the test to determine whether or not a proceeding is criminal or civil in *Huntington* v. *Atrill*,, 146 US 657 when it held that it depends on whether its purpose is "remedial" or "penal" and "it depends upon the question whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to a person injured by the wrongful act . . ."

This test has been followed by the lower federal courts when the question arose as to whether the 5th Amendment privilege was available in treble damage proceedings under the Emergency Price Control Act, *Bowles* v. *Seitz*, 62 FS 773; *Amato* v. *Porter*, 157 F2 719. In the *Bowles* case the Court held the 5th Amendment applies "only to criminal cases in the ordinary sense of that term" and that damages under the Act were "designated as reparation to sufferers from wrongs and not penalties recoverable in vindication of the public justice of the State." Other federal cases where the 5th Amendment privilege did not apply because the purpose of the proceeding was preventative and remedial rather than punitive and criminal are *Kent* v. *U. S.*, 157 F2 1, (Libel proceeding to forfeit distilled spirits and a truck used in violation of revenue laws); *U. S.* v. *One 1948 Cadillac Convertible Coupe*, 115 FS 723 (Proceeding for forfeiture of a vehicle used in unlawful narcotics transportation); *Zakonaite* v. *Wolf*, 33 S. Ct. 31; *Chen Chan Chu* v. *Shaughnessy*, 149 US 698 (deportation proceedings), and *Camden County Beverage Co.* v. *Blair*, 46 F2 648 (Proceeding for revocation of a permit).

Under the Ohio Bastardy Act (Chapter 3111, Ohio Revised Code) upon a finding of paternity the Court orders the reputed father to pay to complainant for the "support and maintenance of the child." He pays no fine to the State. There is no imprisonment unless he refuses to comply with the support order and then he shall be confined

only "until he complies with the order of the Court." Clearly the Ohio Bastardy Act has a remedial rather than a punitive purpose and therefore is a civil case in which the defendant may be compelled to testify. Petition has advanced neither reason nor authority why this Court should reverse the general rule established in the *Huntington* case and followed in Ohio and throughout this nation.

II. Petitioner's claim that he was compelled to answer a question that would incriminate him with respect to some other proceeding, has no merit.

Admittedly, a witness in a civil proceeding may invoke the 5th Amendment privilege. However, in the case at bar Petitioner did not raise the privilege in response to any of the specific questions. The Court had no opportunity to rule on the questions. As stated in the famous *Burr* case "when a question is propounded, it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. *U. S.* v. *Burr,* 25 Fed. Cas. No. 14,692. This rule is restated in *Rogers* v. *U. S.,* 340 US 367:

> "As to each question to which a claim of privilege is directed the Court must determine whether the answer to that particular question would subject the witness to a real danger of further crimination."

In a civil proceeding, the proper time to raise the objection is at the time the question is asked and not at the beginning of the testimony or in a brief two years later. See 98 *CJS* 296. In this case there was no compulsion because there was no objection and no claim of self-incrimination as to the specific question. As was stated in the *Burr* case "the privilege is available only if the Defendant says upon his oath that his answer would criminate himself."

Petitioner's only objection was at the beginning of his examination and was that testifying generally would incriminate him with respect to the instant bastardy proceeding. (R 94-98) **At trial he never claimed that his testimony would incriminate him with respect to some other possible danger or proceeding.** Petitioner proceeded to voluntarily answer each and every question without objection. This is a classic example of waiver. Petitioner's claim at this late date is the kind of "pure afterthought" condemned in *Rogers* v. *U. S.,* 340 US 367.

The privilege "is deemed waived unless invoked" *U. S.* v. *Murdick,* 284 US 141. Petitioner's motion for a new trial and assignments of error (Petitioner's Exhibits G and J) only protested that Respondent was forced to testify as on cross-examination.

Never, at trial nor in briefs and argument to the trial court, Court of Appeals or Supreme Court of Ohio, did petitioner ever object on the ground that his answer might incriminate him with respect to prosecution for fornication. Respondent has no standing to raise this later question for the first time in this Honorable Court after this waiver in the Courts of Ohio.

In any event the protection of the 5th Amendment "must be confined to instances where the witness has reasonable danger from direct answer." *Hoffman* v. *U. S.,* 341 US 479. Disclosure of intimacy with Respondent presented no more than a "mere imaginary possibility" of prosecution under Ohio Revised Code 2905.08 which prohibits adultery and fornication. Respondent and Petitioner were both single at the time of the intercourse, and no charge of adultery was possible. Constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of the law." *Mason* v. *U. S.,* 244 US 362 and does not apply to "dangers of an imaginary and insubstantial

character, having reference to some extraordinary and barely possible contingency so improbable that no reasonable man would suffer it to influence his conduct." *Brown* v. *Walker,* 161 US 591.

No one has been prosecuted for fornication in Hamilton County, Ohio in the past twenty years. Defendant exhibited no fears of prosecution when he answered the same question in deposition taken by agreement of counsel prior to the trial. Defendant had no fears of prosecution at the time of trial, or for that matter until this petition was filed nearly two years later.

All this evidence belies the argument that petitioner ever considered himself in any kind of danger.

III. Petitioner's claim that he was deprived of the right to an impartial jury under the 6th Amendment has no merit.

There is no authority or reason stated why this Honorable Court should accept the affidavits offered by petitioner and reject the affidavits offered by Respondent. As the Court stated in the case of *Whited* v. *State ex rel Fuller,* 21 OLA 469:

> ". . . the defendant produced the affidavits of Mike Basbore and Robert Comer to the effect that about the noon hour on the day of trial, they heard the juror, Frank T. Kohlhorst, discuss the merits of the case and that they heard said juror say that as far as he was concerned the case was decided. As opposed to this claim, the Complainant presented to the Court the affidavits of said Frank T. Kohlhorst and William Gest. These affiants denied a discussion of the merits of the instant case . . . In disposing of this ground of the motion for new trial, the Court had before it these affidavits. When it overruled the motion the trial Court evidently found that there had been no

> misconduct on the part of this juror. From any examination of the record as it appears we cannot say that this was an erroneous finding of the Court."

Even if petitioner's allegations were considered to be true, there is no evidence showing any material prejudice to petitioner or lack of due process. As stated in *Turnpike Commission* v. *Ellis,* 164 OS 377:

> "The refusal of the Trial Court to grant a new trial for claimed misconduct of a juror in making improper and indiscreet remarks during the progress of the trial will not be disturbed where such remarks were not induced by either party or his counsel and where it is not apparent that the juror's indiscretion influenced the unanimous verdict returned."

The record indicates no reason for reversing the Trial Court's determination of fact with respect to the conflicting affidavits.

CONCLUSION

Petitioner has shown no error in the proceedings or reason why this cause should be reviewed by this Court. For all these reasons the petition should be denied.

Respectfully submitted,

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